U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	COMMANDANT
vs.	:	
	:	ON APPEAL
LICENSE NO. 64609 and MERCHANT MARINER'S DOCUMENT NO. 506 84 6843	:	NO. 2537
	:	
Issued to: Lyle CHATHAM	:	

This appeal has been taken in accordance with 46 U.S.C. §7702 and 46 C.F.R. §5.701.

By an order dated 9 October 1991, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's License and Merchant Mariner's Document upon finding proved the charge of use of dangerous drugs. The single specification supporting the charge alleged that, on or about 21 January 1991, Appellant wrongfully used marijuana as evidenced in a urine specimen collected on that date which subsequently tested positive for the presence of marijuana.

The hearing was held at New York, New York on 30 May 1991. Appellant appeared at the hearing and chose to represent himself pro se. The Administrative Law Judge clearly and succinctly advised Appellant of the procedures, and applicable rights, including the right to counsel or other representation. Appellant knowingly, intelligently and voluntarily waived his right to counsel and chose pro se representation.

Appellant entered a response of deny to the charge and specification as provided in 46 C.F.R. 5.527. The Investigating Officer introduced three exhibits into evidence and two witnesses testified at his request. Appellant testified on his own behalf and fully participated in the cross examination of witnesses.

The Administrative Law Judge's final order revoking all Licenses and Documents issued to Appellant was entered on

9 October 1991, and was served on Appellant on 18 October 1991. Appellant received a copy of the full transcript on 21 October 1991, and filed a notice of appeal on that same date. Appellant filed his brief on 26 November 1991, within the filing requirements of 46 C.F.R. §5.703. Accordingly, this matter is properly before the Commandant for review.

Appearance: Lyle Chatham, pro se, 11 Maiden Lane, New York, New York 10038.

FINDINGS OF FACT

At all times relevant herein, Appellant was the holder of the above captioned License and Document, issued to him by the United States Coast Guard.

On 21 January 1991, Appellant, at the direction of his employer, Eklof Marine, Corp., provided a post-accident urine specimen for drug testing purposes at Eklof Marine Corp., Staten Island New York. The specimen collector, Salvatore Magro was the personnel manager of Eklof Marine.

Appellant filled the specimen bottle in the bathroom, capped the bottle and returned it to the collector. Mr. Magro sealed the bottle with a tamper-proof seal, identifying it with Number 1219662, in Appellant's presence. Appellant then signed and certified the company copy and the medical review officer (MRO) copy of the Drug Testing Custody and Control Form (DTCC).

This certification indicated that Appellant had provided the urine specimen to Mr. Magro, that the bottle was sealed with a tamper-proof seal in his presence and that the identification label was affixed to the specimen bottle.

Mr. Magro signed and certified the requisite portions of the documentation. The specimen bottle was sealed in a shipping bag and picked up by a courier for the testing laboratory, Smith Kline Beechman (SKB). SKB laboratory is an approved testing facility under guidelines promulgated by the Department of Health and Human Services.

SKB laboratory certified receipt of Appellant's specimen on 22 January 1991, with the tamper-proof seals still intact. The specimen was analyzed in accordance with applicable federal requirements. The specimen tested positive for marijuana. SKB forwarded its laboratory report and the DTCC form to the MRO,

Dr. Peter Timpone.

At the MRO's request, SKB retested Appellant's specimen. That retest showed the presence of marijuana metabolite. The results of the retest were telephonically communicated to the MRO.

Subsequent to receiving the retest results, the MRO engaged in a telephone conversation with a person who identified himself as Lyle Chatham, and who denied ever using marijuana. The MRO cannot recall if he initiated the telephone call or if the telephone call was initiated by Appellant. Appellant denies ever talking to the MRO. Subsequently, the MRO determined that Appellant's specimen tested positive for marijuana and executed the requisite portion of the DTCC form.

On 25 January 1991, the MRO notified Eklof Marine by telephone of the results of the test.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge revoking Appellant's license and document. Appellant sets forth the following bases of appeal:

1. Appellant did not receive the hearing transcript until 29 July 1991. As a result, Appellant was unable to comply with the Administrative Law Judge's deadline to submit proposed findings of fact and conclusions of law within 30 days after the hearing, which was completed on 30 May 1991;

2. The chain of custody control (DTCC) form used to track Appellant's urine specimen did not comply with regulatory requirements;

3. The specimen collector did not properly execute the DTCC;

4. The specimen was not properly sealed for shipment;

5. There is no proof that Appellant's urine specimen was retested;

6. Telephonic transmission of retest results by the MRO violated regulations.

OPINION

I

Appellant asserts that since he did not receive the hearing transcript until 29 July 1991, nearly two months after the completion of the hearing, he was unable to prepare and submit proposed findings of fact and conclusions of law within 30 days, as ordered by the Administrative Law Judge. I do not agree.

The record reflects that Appellant was clearly advised by the Administrative Law Judge to submit proposed findings and conclusions within 30 days. Appellant specifically stated on the record that he would make such a submittal within 30 days. [TR 132-133].

The pertinent regulation, 46 C.F.R. §5.561, allows the Administrative Law Judge to set a reasonable time for the submission of proposed findings and conclusions. That regulation states that failure to comply within the time fixed by the Administrative Law Judge "shall be regarded as a waiver of the right."

There is no regulatory requirement that the transcript be made available prior to submission of findings and conclusions. While the loss or destruction of a transcript or the denial of

the right to a transcript will merit dismissal of the charge (See, Appeal Decisions 2394 (ANTUNEZ); 2399 (LANCASTER); 2320, 2328 (MINTZ)), government production of the hearing transcript within 60 days of the hearing is not unreasonable and does not violate Appellant's due process rights.

Additionally, it is noted that Appellant requested no extension of time to file his proposed findings and conclusions at the hearing or at any subsequent time. Accordingly, Appellant's assertion that he was deprived of his right to submit findings and conclusions is without merit.

II

Appellant asserts that the DTCC form did not comply with regulatory requirements. Specifically, Appellant urges that the form was deficient in the following aspects:

a. The form failed to specifically state the drugs for which the specimen would be tested (49 C.F.R. §40.23(a)(1)(v);

b. The form failed to state collector's data; a space to insert remarks; a statement as to whether or not a split specimen method was used, and if so, appropriate data (49 C.F.R. §23(a)(1)(ix);

c. The form failed to set forth donor information as required in 49 C.F.R. §40.23(a)(4);

d. The form failed to set forth a statement, pursuant to 49 C.F.R. §40.23(a)(5) advising Appellant regarding over-the-counter medications possibly taken and the fact that the MRO would contact Appellant regarding a confirmed positive finding and any applicable prescription medication.

Appellant is factually correct that the DTCC form in issue did not state the drug(s) for which the specimen was to be tested. Additionally, the form did not provide for the specimen donor's daytime phone number, as required by the regulations. Finally, the form did not provide a statement advising Appellant that he would be contacted by the MRO in the event of a positive test result and that he may want to make a list of prescription medications recently taken.

Those remaining discrepancies alleged by Appellant (subparagraph c., supra) are without merit since they relate exclusively to split-specimen screening which was not required and not conducted in this case. 49 C.F.R. §40.23(a)(1)(ix).

Upon a comprehensive review of the evidence and the regulations, I find the above-cited discrepancies to be minor and technical in nature. The record reflects that the procedures employed, the chain of custody and documentation all substantially comply with the drug testing regulations.

The preamble to the regulations in issue states that "employers are not required to photocopy [the custody control form detailed in 49 C.F.R. Part 40, Appendix A]; they may gather the information in a somewhat different format." 54 Fed. Reg. 49861 (1989). A DTCC form which failed to include the necessary donor or collector certifications or jeopardized the chain of custody of the specimen would "[n]ot be consistent with
[49 C.F.R. Part 40] requirements." 54 Fed. Reg. 49862 (1989).

In the instant case, all necessary certifications of the specimen donor and collector are stated on the form. All

signatures are properly executed. The donor is identified by name and by social security, as permitted by 49 C.F.R. §40.23(a)(6). A remarks section is contained on the form, in which the collector noted that Appellant was not on medication.

Based on the foregoing, I find that the DTCC form utilized in the instant case clearly and efficiently tracks and documents the processing and custody of Appellant's urine specimen. Notwithstanding the noted minor deficiencies, the form meets the essential provisions of the regulations, promulgated to ensure the identification and protection of the integrity of the specimen, and contains the required certifications.

This determination is consonant with Appeal Decision 2522 (JENKINS), in which the failure to meet a technical requirement of the regulations that did not vitiate the chain of custody or the integrity of the specimen was deemed to be non-fatal. Accordingly, I find no infringement of Appellant's due process rights.

III

Appellant asserts that the specimen collector failed to properly execute the DTCC form in violation of 49 C.F.R. §40.25(C) (sic).

Title 49 C.F.R. §40.25(c) requires the collection site personnel to properly execute the chain of custody block of the DTCC form.

The evidence (I.O. Exhibits 4, 5) reflect that the specimen collector, Salvatore Magro executed the required sections of the

DTCC form, including his signature, certifying identification and proper collection, labeling and sealing of the urine specimen.

Accordingly, Appellant's assertion is not supported by the evidence.

IV

Appellant asserts that the specimen was shipped in a sealed bag in violation of 49 C.F.R. §40.25(H) (sic). I disagree.

Title 49 C.F.R. §40.25(h) states that the "specimen shall be placed in shipping containers designed to minimize the possibility of damage during shipment (e.g., specimen boxes and/or padded mailers) . . ."

Contrary to Appellant's assertions, this regulation neither prohibits shipment in bags nor mandates shipment in boxes. It merely requires shipment in a manner to minimize risk of damage to the specimen. The use of boxes or padded mailers is merely provided as an example.

In the instant case, Appellant's urine specimen was first placed in a sealed bottle with an identification/accession number. The bottle was then placed in a plastic tamper-proof bag. The bag was then sealed, with Appellant placing his initials on the bag. [TR 35]. The sealed bag was then prepared for shipment in Appellant's presence and placed in a "courier pouch" for pickup by an SKB courier. [TR 54]. The specimen was prepared and sealed for shipment on 21 January 1991, and picked up by the SKB courier that same day. I.O. Exhibits 4, 5.

The record reflects no evidence of tampering or breach of the chain of custody. Accordingly, the shipment of Appellant's urine specimen in a bag and courier pouch did not violate regulations.

V

Appellant asserts that there is insufficient evidence to prove that his urine specimen was retested. I do not agree.

The record reflects that the MRO advised SKB Laboratory to retest the urine specimen following the initial positive test result. The laboratory conducted the retest and telephoned the positive results to the MRO. [TR 86]. The MRO specifically ordered the retest because he had previously given a physical examination to Appellant (6 months prior to positive test result) and recalled that Appellant had been drug free during that physical examination. [TR 86]. Accordingly, the MRO clearly recalled this retest and the reason it was ordered. The only contrary evidence is Appellant's statement that a retest never occurred.

I find that the record supports the fact that Appellant's urine specimen was retested.

VI

Appellant asserts that the retest results were communicated telephonically, in violation of 49 C.F.R. §40.29(4).

The MRO testified that the retest results were transmitted

telephonically. [TR 86]. However, the initial test results were transmitted to the MRO in writing by the testing laboratory.
[TR 78].

A technical violation of the regulation did occur because of the telephonic communication of the test results by the MRO. However, the purpose of this regulation is to protect the privacy of the specimen donor and does not relate to the admissibility of evidence. Notwithstanding the technical deviation from the regulation, in the case herein, the collection process, chain of custody, integrity of the urine specimen and reliability of the drug testing procedures employed were neither hampered nor invalidated. Accordingly, this technical violation constitutes harmless error.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated 9 October 1991, is hereby AFFIRMED.

//S// MARTIN H. DANIELL
MARTIN H. DANIELL
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 12th day of May, 1992.